90-1753

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
vs.
PAUL LANCE GONDER,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

WHERE A TRIAL JUDGE AT A BENCH TRIAL RENDERS AN INTERNALLY INCONSISTENT VERDICT; THAT IS, WHERE THE JUDGE ANNOUNCES A VERDICT OF GUILT ON ONE OFFENSE BY SPECIFICALLY FINDING ALL ELEMENTS OF THAT OFFENSE PROVEN BEYOND A REASONABLE DOUBT, BUT ALSO CONTINUES ON TO ANNOUNCE A VERDICT ON A LESSER OFFENSE BECAUSE OF A MISTAKE OF LAW AS TO THE ELEMENTS COMPRISING THE CHARGED OFFENSE, DOES SANABRIA V UNITED STATES COMPEL THE CONCLUSION THAT THE JUDGE MAY NOT, CONSISTENT WITH PRINCIPLES OF DOUBLE JEOPARDY, CURE THE INCONSISTENT VERDICT BY REFORMING THE ANNOUNCED VERDICT TO CONFORM WITH THE SPECIFIC FACTUAL FINDINGS OF THE COURT?

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IN THE SUPREME COURT OF THE UNITED STATES
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**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN**

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of Research, Training and appeals, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on February 22, 1995, leave to appeal denied by the Michigan Supreme Court April 29, 1991.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A. The Order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on February 22, 1991. The judgment of the Michigan Supreme Court was entered on April 29, 1991. The jurisdiction of this Court is invoked under 28 USC { 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in

pertinent part: "No person shall be...subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts show that the court fact-findings at this bench trial were that the defendant touched the genital area of a nine year old complainant for the purpose of sexual gratification. By making such a fact-finding, the trial judge was announcing a verdict of guilty of criminal sexual conduct in the second degree by finding all the elements of that offense proven beyond a reasonable doubt. However, the trial judge then announced a verdict of guilt of criminal sexual conduct in the fourth degree. At the time of sentencing the court acknowledged that his fact-finding verdict and his announcement of the verdict were inconsistent, and reformed the announced verdict to conform to his fact-finding (see T. 4-5, May 10,

1989, and Mo. Tr. 8-9, Sept. 27, 1989). Subsequently, the court sentenced the defendant to a 1-15 year term.

The Michigan Court of Appeals reversed the verdict of criminal sexual conduct in the second degree, holding that principles of double jeopardy precluded the trial judge from conforming his announced verdict with his announced fact-finding on the elements, citing Wayne County Prosecutor v Recorder's Court Judge, 179 Mich App 762 (1989), which in turn was premised on Sanabria v United States, 437 US 54, 57 L Ed 2d 43, 98 S Ct 2170 (1978) (though the court acknowledged that the trial court had erred in his initial verdict by misunderstanding the elements comprising the charged offense (see slip op at p.2)). The People sought leave to appeal from the Michigan Supreme Court, which was denied.

REASONS FOR GRANTING THE WRIT

Petitioner submits that Sanabria v United States, infra, being a multiple prosecution case, does not prohibit reforming an announced "verdict" to conform to the fact-finding of the court, made beyond a reasonable doubt, where the verdict is inconsistent with that fact-finding because of a mistake of law. Because much of the law of jeopardy appears to be a doctrine in search of a rationale, Petitioner will first devote some time to the historical background of present jeopardy principles, in the hope of demonstrating that this history reveals that the actions taken by the trial judge in this case to correct his error were permissible, and that the accused should not receive a windfall because of a mistake in law by the trial court.

A. An Abbreviated History of Jeopardy

Though language in treatises and reports of the day suggest the presence of a doctrine resembling double jeopardy, early English law mingled concepts of tort and criminality, and depended in large measure on the institution of actions by private accusers to bring wrongdoers to justice. Sigler, Double Jeopardy: The Development of a Legal and Social Policy, (1969), at 7-14. Thus, while the plea of prior acquittal would not bar an indictment by the King, it would prevent the institution of a second suit by the same accuser by way of criminal appeal. Sigler, at 13-14. Whether this reflected the notion that "the king can do no wrong," III Blackstone, Commentaries on the Laws of England, (Legal Classics Ed, 1983), 254 ("Commentaries" below), or simply the Crown's practical weakness to enforce a

unified code of conduct in a day of feudal lords and limited communications, is unclear. See Sigler, at 9, 15. In any event, it was not until the consolidation of national power in the hands of a sovereign King that double jeopardy as a formal legal concept began to crystallize; and the foundation of our modern doctrines of jeopardy are the twin pillars of English law, Coke and Blackstone.

Completed in 1642, the Institutes of Sir Edward Coke sought to gather and outline the "full expanse of English common law" -- to which Coke added a heathy dose of his own opinions. Sigler, at 17. Partly out of desire to mitigate the harshness of contemporary criminal law, and perhaps from a desire to lessen the absolute power of the monarch, Coke's formulation clearly limited double jeopardy to criminal cases, but advanced the concept

as a protection against the power of the State even for minor offenses. Sigler, at 18-19.

Even so, Coke's conception of double jeopardy -- contained in the pleas of autrefois attaint, autrefois acquit, autrefois convict, and former pardon -- offered a different measure of protection than their modern counterparts, often depending upon the precise nature of the prior proceeding. Sigler, at 17-19. For example, while autrefois acquit upon an indictment for murder was no bar to an appeal -- an early form of private prosecution -- for the same cause, a finding that the accused killed in self defense settled the matter once and for all. Coke, The Third Part of the Institutes of the Laws of England (4th Ed), (Hein Ed, 1986), 213-214. Moreover, a prior attainder -- involving a host of

disabilities and forfeitures -- would offer no protection against a different class of crimes and offenses, and the degree of "jeopardy" involved in Coke's formulation was often of fundamental importance -- placing one's own life in literal jeopardy:

> "Where...before it is said, that a felon by his Attainder is mort in ley, it is understood of such former offences as require poenam mortis: for notwithstanding the Attainder, his body remains subject to arrests and executions for debts....[But] if a man be attained of petit larceny, he may be after attained of felony, for which he shall have judgment of death, because it is a higher offence, and is to have another judgment."

Though the doctrine began to coalesce, the archaic laws and procedures of the day make the plea sound alien and unfamiliar to modern ears. And it would fall to Blackstone, writing a century later, to cast double jeopardy into something resembling its modern form.

Blackstone's formulation of "double jeopardy" came by way of a plea in bar, going not to the merits of the cause but "to the merits of the indictment," and giving "a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged." IV Commentaries, at 329. Drawing from the work of Coke, Blackstone identified four such pleas, outlining them in some detail:

> "First, the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime....
>
> * * *
>
> "Secondly, the plea of

autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime....

* * *

Thirdly, the plea of autrefois attaint, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict of confession, by outlawry, or heretofore by abjuration...he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. And this [is] because, generally, such proceeding on a second prosecution cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had...so that it is absurd and superfluous to endeavor to attaint him a second time....And from these instances we may collect that the plea of autrefois attaint is never good, but when a second trial would be quite superfluous.

* * *

> "Lastly, a pardon may be pleaded in bar...as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict...."

IV Commentaries, at 329-331.

Though the American rejection of the concept of "corruption of blood" would render obsolete the plea of autrefois attaint, Blackstone's formulation stands as the authoritative expression of the Law's policy against multiple punishments at the time of the Bill of Rights. And though his language suggests several differences between the 18th Century practice and our own, it was this conception that entered our legal system as the doctrine of Double Jeopardy.

By the time of Kepner v United States, 195 US 100; __ S Ct ___; 49 L Ed 114 (1904) in our jurisprudential development the

Supreme Court counted among its members Oliver Wendell Holmes, Jr. Kepner brought to the Court both a unique set of legal problems, and a clearly-marked point of delineation in the realm of double jeopardy law: the Spanish-American war had brought the Philippines under the jurisdiction of American law, and Congress had passed a law establishing local courts, and providing for local self-government. Among the many aspects of the new judicial code was a provision that "no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment....." 32 Stat at L 691, ch 1369, sec 5; Kepner v United States, supra at 117. Spanish law had contained an analogous provision, providing that one convicted or acquitted of a crime could not be charged again for the same crime, but defining "jeopardy" as the attachment of a

final judgment. Under Spanish law, either side to a criminal case could appeal any aspect of the case, and the appellate courts could grant a new trial upon the appeal of either party; accordingly, a judgment was deemed "final" only when the "audiencia," or local supreme court, had passed upon the case, and the matter had passed final review in the supreme court at Madrid. Under this system, the action was considered to be one continuous proceeding from trial through appeal, and an accused was protected against a second conviction only after the first proceeding was concluded. Kepner saw his initial acquittal in the trial court reversed in the "audiencia" on appeal by the government, and was convicted and sentenced upon retrial. On appeal, he claimed that his second trial violated the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Writing for the five-member majority, Justice Day recounted the old English pleas of autrefois acquit and autrefois convict, and concluded that the finality of a verdict of acquittal was an integral part of the double jeopardy clause -- thus preventing the government from appealing an acquittal even if there were express statutory authority allowing it. Because courts should presume that Congress intended to employ legal terms in a manner consistent with their known construction by the courts, the Court concluded that the enactment making the language of the Double Jeopardy clause part of Philippine law altered the local usage of the term to make it consistent with the American practice. Thus, the Court concluded, it was error to allow the government to appeal the original acquittal, and the defendant was entitled to an immediate discharge.

In his prescient dissent, Justice Holmes warned that the Court's holding threatened to "fasten[] upon the country a doctrine covering the whole criminal law, which...will have serious and evil consequences." Kepner v United States, supra at 134. In his view, the Court's notion of double jeopardy rested upon fiction and illogic, and while the protection against being placed "twice in jeopardy" should prevent a separate cause of action against one already tried, it should be no bar to a just resolution of the first case. In this view, as in Blackstone's, "jeopardy" required a final judgment -- and a judgment set aside, whatever the reason and whomever the moving party, was simply not a judgment:

> "[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may

> be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree or, notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial....
>
> "If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm...." Kepner v United States, supra at 134-135.

The contrary view, in Holmes' opinion, would either deny a defendant the right to overturn an erroneous verdict, or require the Law to impose an implicit waiver of the

Fifth Amendment in every criminal case in which the accused claims an error at trial -- for the only other logical alternative was unacceptable:

> "It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists....I believe [such] decisions to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is, What shall be done with the prisoner? Since at that moment he no longer is in jeopardy from the first verdict, if a second trial in the same case is a second jeopardy....he has the right to go free...." Kepner v United States, supra at 135-136.

Accordingly, Holmes thought the rational solution to the problem was a return to the notion of "jeopardy" as "judgment," and the protection against "double jeopardy" as a guarantee against multiple prosecutions:

> [T]he necessary alternative is

that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy, in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record; as when he is tried on a defective indictment, if judgment is not arrested. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I submit, is that there can be but one jeopardy in one case.

"If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. The latter is everyday practice, yet there is no doubt that the prisoner is in jeopardy at the trial....and that a conviction or acquittal not appealed from would be a bar to a second prosecution....For the[se] reasons..., a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below."

Kepner v United States, supra at 136-137.

This view of double jeopardy has much to commend it: it fixes the point of attachment at the point of enforcement, providing each party with the motive and opportunity to set aside an erroneous judgment, but requiring each to submit to the court's decree in the absence of a reversal. It eliminates the prospect of a single judge unanswerably denying justice either to the accused, or to the victim of crime. And it would place Justice to all emphatically at the heart of judicial concern. But as the contrary view commanded five votes, it was Justice Day's notion of "double jeopardy" that carried the day, and has passed to us as the American doctrine of "double jeopardy" under the Fifth Amendment. However, there is no reason why the logical and historical force of Justice Holmes' view cannot be welcomed in a situation where the Government is not seeking a <u>multiple</u>

prosecution, but rather, as here to clarify the verdict itself. The State here, unlike in Kepner, sought no new trial, but a just and fair verdict, one which comported with the findings of fact, made beyond a reasonable doubt.

FROM FONG FOO THROUGH SANABRIA TO THE INSTANT CASE

In Fong Foo v United States, 369 US 141, 7 L Ed 2d 629, 82 S Ct 671 (1962) a corporation and two of its employees were brought to trial for a conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more days of trial, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all defendants, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United

States Attorney, and a supposed lack of credibility of the witnesses to that point. The Government appealed, and the Circuit Court of Appeals granted the appeal, holding that the district court had no power to grant the directed acquittal under the circumstances of the case. Though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation" the United States Supreme Court held nonetheless that the verdict of acquittal was "final and could not be reviewed." The government, of course, was seeking a second prosecution of the defendant by a setting aside of the acquittal.

On the road to Sanabria it is important to pause at United States v Martin Linen Supply Co, 430 US 564, 571, 97 S Ct 1349, 51 L Ed 2d 642 (1977), because there the Court made it clear that a

reviewing court would not be bound by the trial court's description of its actions. The Court held that once jeopardy attached, a court's factual resolution of any of the elements of the charged offense would call the protections of the Double Jeopardy Clause into play -- regardless of any trial court error in rendering judgment, and whether or not the case required further fact-finding before entry.

In Sanabria v United States, 437 US 54, 57 L Ed 2d 43, 98 S Ct 2170 (1978), after all sides had rested, the trial judge excluded evidence of illegal numbers betting on grounds that the Government had cited the wrong underlying state statute in its federal indictment, and in the absence of any other evidence of guilt, entered a "judgment of acquittal" on defendant's motion. The following day, the Government moved for reconsideration, on grounds that

a technical defect in the indictment was correctable under the Federal Rules of Criminal Procedure. On appeal, the First Circuit held that since the proceedings had terminated on grounds unrelated to the defendant's criminal liability, and on the defendant's motion, double jeopardy would not bar a retrial under the holding in United States v Dinitz, 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976); and as the trial court had erred in dismissing the case for a technical defect in the pleadings, the court reversed the order and remanded for retrial.

On certiorari, the Supreme Court reversed. Noting a difference between a true acquittal on the merits, and a dismissal which is "functionally equivalent to a mistrial," Sanabria v United States, supra at 437 US 63 n 15, the Court nevertheless declined to review the reasons

for an acquittal, holding that even when it stems from a judge's erroneous exclusion of evidence, a "judgment of acquittal, however erroneous, bars further prosecution on any aspect" (emphasis added) of the case, Sanabria, at 69. Rather, the Court felt that the a contrary rule, permitting retrial upon review of all midtrial evidentiary rulings, "would undercut the adversary assumption on which our system of criminal justice rests," Sanabria, at 78, and materially compromise the protections of the Double Jeopardy Clause. Thus, while a defendant seeking a midtrial termination of the proceedings would take "the risk that an appellate court will reverse the trial court," United States v Scott, supra at 437 US 100 n 13, a termination resulting in outright acquittal was simply not subject to a review which could lead to a second trial.

The Michigan Court of Appeals in the instant case disallowed the trial judge's reformation of his internally inconsistent verdict by citing Wayne County Prosecutor v Recorder's Court Judge, 177 Mich App 762 (1989), and stated that "even when a trial court in a bench trial commits a legal error in reaching its verdict, retrial on the original charge is barred by double jeopardy where the conviction for a lesser-included offense operates as an acquittal of the originally charged crime" (emphasis added). But the Court of Appeals in this case, and in Wayne County Prosecutor, failed to take account of the fact that the People were not, in either case, seeking a retrial; rather, the People were seeking an order that the announced verdict of the trial judge comport with the "fact-finding" verdict. Wayne County Prosecutor relied on Sanabria, and Sanabria, being concerned with multiple

prosecutions, is inapplicable. Where what the People are seeking (and here obtained from the trial judge) is an announced verdict or judgment which comports with the fact-finding of the judge, where the judge has as a matter of fact issued an internally inconsistent verdict by finding, specifically, all elements proven beyond a reasonable doubt but then, because of a misunderstanding of the law, announced a verdict not in accordance with that fact-finding, and where no new trial is required to correct the verdict, Fong Foo, Sanabria, and all the other jeopardy cases are inapplicable. To say, as did the Court of Appeals here, and in Wayne County Prosecutor, that the People seek appeal after the "trial judge effectively acquitted the defendant" begs the question, for what must be answered is whether, by an announced verdict inconsistent with fact-finding, the trial judge did

"effectively acquit" the defendant of the greater charge. Because jeopardy doctrine is substantially unsettled, and because Sanabria does not govern this case, this Court should answer that question.

RELIEF

WHEREFORE, the People request that th
plenary review be granted.

Respectfully submitted,

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TIMOTHY A. BAUGHMAN
Chief of Research,
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APPENDIX A

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee, February 22, 1991

v

PAUL LANCE GONDER, No. 120933
Defendant-Appellant

Before: Holbrook, Jr., P.J., and Wahls and T.G. Kavanagh,JJ.

PER CURIUM

Defendant was charged with two counts of criminal sexual conduct, first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of criminal sexual conduct, second degree, MCL 750.520c; MSA 28.788(3). After a two-day bench trial, defendant was found guilty of criminal sexual conduct, fourth degree, MCL 750.520e; MSA 28.788(5). On the day of sentencing, however, the trial court changed its verdict to criminal sexual conduct, second degree, and

subsequently sentenced defendant to a term of imprisonment of one to fifteen years. Defendant now appeals by leave granted.

Defendant first argues the trial court erred when it changed its verdict from criminal sexual conduct fourth degree to criminal sexual conduct second degree. By initially finding him guilty of a lesser included offense, defendant argues the trial court acquitted him of the originally charged offenses. By changing the verdict, defendant asserts the trial court placed him in double jeopardy in violation of his rights under the state and federal constitutions. We agree.

At the conclusion of the bench trial, the trial judge articulated his findings of fact and conclusions of law.

The trial judge reviewed the testimony, stating:

> I do believe, however, after listening to all the testimony and examining all the elements in this particular case. Specifically, the three crimes that are charged to this defendant, that the People have not satisfied their burden of proof to this Court beyond a reasonable doubt to the crimes charged.

Immediately thereafter, the trial court set forth specific findings:

> This court does believe that Mr. Gonder did intentionally touch the groin area of this small complainant and that this touching was done for the purpose of sexual arousal or sexual gratification. That there was in fact physical force done to accomplish that result.

The court then found defendant guilty of criminal sexual conduct in the fourth degree.

A court shall find the facts specifically, state separately its conclusions of law and direct entry of

the appropriate judgment in actions tried on the facts without a jury. MCR2.517(A)(1). An amendment of the judgment or the court's finding is permitted on motion of a party made within twenty-one days after entry of judgment. MCR2.517(B). The rules of civil procedure apply to criminal cases unless otherwise provided by rule or statute. MCR6.001. MCL 770.12; MSA 28.1109 provides that the prosecution may take an appeal of right from a final judgment in a criminal case if the protection against double jeopardy under the Michigan and United States constitutions would not bar further proceedings against the defendant. People v Cooke, 419 Mich 420, 428; 355 NW2d 88 (1984). In a bench trial jeopardy attaches once the first witness is sworn. People v Brower, 164 Mich App 242,246; 416 NW2d 397 (1987), lv den 430

Mich 864 (1988), cert den 488 US 933, 109 S Ct 327, 102 L Ed 2d 344 (1988).

From the record, it does not appear that the prosecutor made a formal motion to amend the judgment or findings of fact. Rather, the prosecutor argued prior to the first scheduled sentencing date that this Court's holding in People v Murphy, 146 Mich App 724; 381 NW2d 798 (1985), mandated a verdict of second-degree criminal sexual conduct in the instant case.

In Murphy, this Court held that it was not error for the trial judge at a bench trial to refuse to consider the charge of fourth-degree criminal sexual conduct where the complainant was nine years old at the time of the offense and, therefore, the facts were insufficient to support a conviction of fourth-degree

criminal sexual conduct. Id, p.727. We do not believe that the Murphy holding can be read so broadly as to mandate a verdict of guilt of second-degree criminal sexual conduct in the case before use.

As in Murphy, in the instant case there was no factual dispute by anyone that the victim was other than less than thirteen years old at the time of the offense. Unlike in Murphy, however, the defendant before us was found guilty by the trial judge of fourth-degree criminal sexual conduct despite the absence of evidence at trial that the victim was other than less than thirteen years old. To read Murphy as broadly as the prosecutor urges would legitimize a change in verdict otherwise impermissible under principles of double jeopardy protection.

Even when a trial court in a bench trial commits a legal error in reaching its verdict, retrial on the original charge is barred by double jeopardy where the conviction for a lesser-included offense operates as an acquittal of the originally charged crime. See Wayne County Prosecutor v Detroit Recorder's Court Judge, 177 Mich App 762; 442 NW2d 771 (1989), lv den 433 Mich 900 (1989). This court has held that fourth-degree criminal sexual conduct is a necessarily included lesser offense of second-degree criminal sexual conduct but in doing so, the element of the victim's age was not addressed as a distinguishing feature. People v Gorney, 99 Mich App 199, 205; 297 NW2d 648 (1980), lv den 410 Mich 911 (1981); People v Green, 86 Mich App 142, 151; 272 NW2d 216 (1978).

In the case at bar, second-degree criminal sexual conduct is distinguished from fourth-degree criminal sexual conduct by the age of the victim, that is, one can be convicted of second-degree criminal sexual conduct by engaging in criminal sexual contact with a person less than thirteen years old even in the absence of the circumstances necessary for the conviction of fourth-degree criminal sexual conduct. Therefore, fourth-degree criminal sexual conduct would be a cognate lesser offense.

As such, we find the trial judge's verdict of guilty of fourth-degree criminal sexual conduct, even though resulting from an incorrect application of the law, bars a subsequent change of the verdict to second-degree criminal sexual conduct, where conviction of fourth-degree criminal sexual conduct

acts as an acquittal of the charges of first- and second-degree criminal conduct and where subsequent proceedings would be barred by double jeopardy protections. We therefore reverse defendant's conviction of second-degree criminal sexual conduct, reinstate is original conviction of fourth-degree criminal sexual conduct and remand for resentencing on this reinstated conviction.

As to defendant's remaining arguments concerning the testimony of the victim and his mother, we find no abuse of discretion of the trial court in admitting the testimony. See People v Hackney, 183 Mich App 516; 455 NW2d 358 (1990).

The victim's mother, Penelope Brown, testified about her conversation with her

son and about her relationship with the defendant and their divorce and custody fight. Ms. Brown's testimony was relied upon both by the prosecutor, in his closing argument, and the trial court, in its findings of fact, to establish the victim's age and the timing and sequence of the alleged acts. We cannot conclude that the trial court abused its discretion in admitting Ms. Brown's testimony for such a limited non-hearsay purpose.

As to the victim's testimony, we will not review a trial court's decision to allow a child witness to testify absent an abuse of discretion. People v Cobb, 108 Mich App 573, 575; 310 NW2d 798 (1981). Furthermore, questions of credibility should be left to the trier of fact to resolve. People v Daniels, 172 Mich App 374, 378; 431 NW2d 846

(1988), lv den 433 Mich 906 (1989). The trial court questioned the ten-year-old victim and found him qualified and competent to testify. We find no abuse of discretion in that decision.

Defendant's conviction of criminal sexual conduct second degree is reversed, his conviction of criminal sexual conduct fourth degree is reinstated and we remand for resentencing on the reinstated conviction. We do not retain further jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/Myron H. Wahls.
/s/Thomas G. Kavanagh

APPENDIX B

MICHIGAN SUPREME COURT

ORDER
Entered: April 29, 1991

91103

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

SC: 91103
COA: 120933
LC: 88-009232

PAUL LANCE GONDER,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michiga Supreme Court, certify that the foregoing i a true and complete copy of the orde entered at the direction of Court.

April 29, 1991 /s/ Corbin R. Davis
Cler